Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-290

ERNESTO LOPEZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ernesto Lopez, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his judgment of conviction.

Opinions Below

The opinion of the Court of Appeals is not yet reported and is reproduced in the Appendix, *infra*, at 1a-10a. The district court below filed no written opinion.

Jurisdiction

Petitioner was indicted in twenty counts for harboring aliens in violation of 8 U.S.C. § 1324(a)(3) and in three counts for making false statements to a government agency in violation of 18 U.S.C. § 1001 and 1546.

On October 23, 1974, the Government rested after eight days of trial. Defense motions to dismiss the harboring counts of the indictment on the ground that the proof did not constitute harboring within the meaning of Section 1324(a)(3) and that the statute was unconstitutional were denied. The petitioner then pleaded guilty to a superceding, two-count information, reserving his right, with the court's permission, to appeal from the adverse rulings on his motions (3a). On January 10, 1975, the petitioner, a first offender, was sentenced to a term of 4 years in prison and fined $10,000.

The judgment of conviction was affirmed by the Court of Appeals for the Second Circuit on June 26, 1975, the court upholding the constitutionality of Section 1324(a) and its applicability to the facts proved by the Government in this case.

Upon timely application for an extension of time in which to file a petition for writ of certiorari, Mr. Justice Marshall extended the filing time to and including August 25, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

Questions Presented

Section 1324(a)(3) of 8 U.S.C. provides, in material part, that any person who "wilfully or knowingly conceals, harbors, or shields from detection . . . in any place, including any building or any means of transportation" . . . "any alien not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States" . . . shall be guilty of a felony, "provided that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

1. Does the statute apply in the absence of proof that a landlord or provider of services to the alien, has concealed or secreted him in order to prevent his detention by immigration officials?

2. Does the statute apply in the absence of proof that the lodging or services rendered to the alien were incidental or connected to the smuggling process?

3. If so, then does the statute fail fairly to appraise a defendant of the conduct it purports to prohibit in violation of the Fifth Amendment?

4. Can Congress impose criminal liability upon one who provides lodging or other services to illegal aliens without concealment, while exempting from criminal liability one who employs illegal aliens, and who may provide such service as a usual and normal practice incident to employment, without violating the due process clause of the Fifth Amendment?

Statutory Provision Involved

8 U.S.C. § 1324: Bringing in and harboring certain aliens; persons liable; authority to arrest

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

* * * * *

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation;

* * * * *

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter

or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring. June 27, 1952, c. 477, Title II, ch. 8, § 274, 66 Stat. 228.

Statement of the Case

The courts below held that the conduct proved by the Government at the trial below constituted "harboring" illegal aliens within the purview of 8 U.S.C. § 1324(a)(3). Unfortunately, the court of appeals opinion totally fails to delineate the conduct proved under the harboring counts of the indictment from the conduct proved under the false statement counts. The opinion also fails to delineate the evidence presented by the Government to prove the petitioner's acts of harboring, and the proof which was introduced and limited to the issue of the petitioner's knowledge of the illegal status of the aliens in question. Thus a short summary of the trial testimony is given, since the initial question we ask the Court to decide is whether the conduct proved under the harboring counts is legally sufficient to constitute a crime under Section 1324(a)(3).

Gladys Lopes entered the United States at Miami on a 15-day tourist visa in January, 1970 (4-5).* She did not know petitioner before she entered the country, nor did he induce her to enter (94). She got petitioner's name from her sister (who was already in the United States) and

* All references to the trial minutes are denoted by page number. Reference to the Appendix are denoted "—a".

rented a room from petitioner because her sister was living in one of petitioner's houses (18, 115). She came to the United States to work (19). Her sister worked in a plastics factory and suggested she go there for a job (116). Petitioner helped her fill out the job application, without charge, because she could not speak English (117). Her rent was $15 per week, and she also paid peititoner $5 per week for transportation by car to and from work (146, 149).

In 1971, she was arrested by Immigration officials and given one month to depart (36, 38). She remained in the United States, and in 1972, the immigration officials again came to petitioner's house to question her (39). She later asked petitioner how to stay in the country and he advised her to marry (40). The witness testified that petitioner found a boy who would marry her for $600, without need for cohabitation (91). Petitioner assisted them in obtaining the marriage license (44) and after the marriage, found a lawyer who prepared her application for permanent residence (49).

Proof as to the marriage was admitted by the trial court to show "willfullness and knowledge"—that "this was not an innocent harboring . . . just a mere fact of somebody renting somebody a house . . . we are trying a harboring case as to the issue of willfulness and knowledge and [the Government] is putting in records of proof [sic] to show the man knew what he was doing" (61).*

* The trial court later reiterated this: "I think it goes to the question of knowledge and willfulness. You are not going to deny he rented the apartment? You're just going to deny that he knew she was an illegal alien. If that's not your defense . . . I take the attitude the Government has to prove their case as to every aspect . . . One of the things they have to prove is knowledge . . ." (89-90).

Cipriana Joya entered the United States through Miami on a 7-day visitor visa in December, 1970 (181). She did not know the petitioner and he did not ask her to immigrate (241). She came in order to work (242). She got petitioner's address from a friend in the United States (243-44). She rented a room from petitioner and he took her to a plastics factory, where she found a job (183-184).* She remained at petitioner's house, paying $15 a week rent (185) and $5 a week for transportation (186). She never hid while living at petitioner's house (256). In 1972, petitioner suggested that she marry in order to obtain permanent residence (239). She did marry for this purpose, paying petitioner $800 after he marriage (239).

The Government characterized this proof as follows:

> "All we are showing is that the defendant Ernesto Lopez aided these people to enter into marriage for the purposes of making application for permanent resident status. That fact alone shows that the defendant knew that they—the aliens had to make the application" (198).

The trial court thrice stated that the evidence as to the marriage "is admitted solely for the purpose of knowledge and intent . . ." (224, 225, 200).

Saul Reyes entered the United States through Miami on a one month visitor's visa in 1970 (300). He came at the suggestion of his brother, who was living in Long Island, and stayed initially with his brother (300-302, 315-16). He came to work, because he couldn't make a living in El Salvador (315). He rented a room from petitioner for $15 per week and began work at the plastics factory (302). Petitioner took him to the factory, but he did not know if petitioner filled out his job application form (305).

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* Petitioner did not own the factory or work there, nor was he paid for bringing people to the factor for work (247-48, 566).

In 1972, Reyes was arrested by Immigration at petitioner's house (307, 320). His brother gave $500 to petitioner to post bond (308). When the witness left the country and the bond was exonerated, petitioner returned the money to the brother (330). Before the arrest, Reyes never discussed his status with petitioner (319, 326-27).

After the deportation, Reyes returned to the United States illegally and again rented a room from petitioner (310). Once again petitioner had nothing to do with his entry into the country (328), nor did they discuss the witness's immigration status (330). While at petitioner's house, he never hid, but went about his work normally (320).

Jose Mercado testified he illegally entered the United States through Mexico in August, 1973 (338). He neither knew nor had heard of petitioner at that time (350). He rented a room from petitioner for $15 a week, having gotten the address from a friend (351). The petitioner took him to the Oxford Penta Flex factory and filled out his job application (341-42). He paid rent to petitioner for eleven months (324).

Jose Flores illegally entered the United States at Los Angeles in August, 1973 (387). He traveled to New York by plane, and went to the home of a friend (388). He then rented a room from the petitioner for $15 a week, staying until he was arrested nine months later (389-90). The petitioner had nothing to do with his illegal entry (394). The witness came in order to obtain work (394). He got the petitioner's address from a friend (394). The petitioner did not find him a job or provide transportation (396). He never told petitioner that he was in the United States illegally (397).

Isabel Martinez-Ramon came to the United States in March, 1974, illegally through Mexico (411). He never heard of the petitioner before he came to New York and petitioner had nothing to do with his entry (416). He came in order to work (416). He rented a room from petitioner after he came to New York, paying rent for three months, until he was arrested by Immigration (412-413). The only contact he had with petitioner was to pay the rent (418).

After the Ramon testimony, the trial court stated it was troubled by lack of proof of knowledge (420). The Government's theory was the following:

> "The same proof will sustain every count. The jury would be called upon to infer knowledge from the circumstances of Mr. Lopez's operation, including the fact that he owned seven houses that were the object of search warrants on Juy 23rd and all the people in his houses with the exception (sic) were illegal El Salvadors. A reasonable man could conclude from those circumstances that he knew what he was doing" (421).

The Government argued that while there was no obligation on a landlord to determine whether an alien was an illegal immigrant, that once he becomes aware some of his tenants are illegal, then it becomes incumbent upon him to determine whether they are all illegal (425).

Enriqua Flores entered illegally through Mexico (427), rented a room from petitioner for seventeen days, saw petitioner twice, never discussed her status with petitioner (433), and did not know petitioner or anything about him prior to entering the United States (432).

Noel Sanchez was smuggled by "cayotes"* into the United States from Mexico (438), got petitioner's address from a relative in Salvador (442), and did not know how long he rented a room from petitioner before he was arrested, though it was possibly a few months (438-41).

Anna Velasquez was smuggled by "cayotes" through Laredo, Texas in March, 1974 (448), came to one of petitioner's houses because a friend lived there (449). She rented a room from petitioner, paying rent for three months and then living without rent for a month as petitioner's mistress (449-52). They never discussed her status in the United States (451).

Angelina Silva entered the United States on a six-month visitor's visa and stayed for four years, renting a room from petitioner (456). She couldn't speak English and asked petitioner as a favor to help her get a job. She also rode to work with him each day (458). She testified she told petitioner she was in the country illegally (458). However, she also testified that the Immigration Department permitted her to stay in the United States because of ill health (461). The Department visited her periodically at petitioner's house to check on her condition (465). She was not arrested by Immigration on July 23, 1974, when the house was searched, as she had a valid extension because of her health (464). When she told petitioner she was an illegal alien, "he said to me you can stay here, but if Immigration comes, I can't do anything" (467).

Santos Martinez was smuggled into the United States from Mexico by "cayotes" (472). He stayed with a friend for three months, then rented a room from petitioner for one month (473-74). He was arrested in petitioner's house (475).

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* "Cayotes" are persons who smuggle alien into the United States across the Mexican border.

Mario Martinez illegally crossed into the United States from Mexico (511). He rented rooms from petitioner for three or four months (513). He came to the United States to work, and rented the room because a relative was living in the house (515).

Cesaria Romero entered Los Angeles with a fifteen-day tourist visa, remaining there eleven months (524-5). She then went to New York, to an address in Levittown, met the petitioner and 'begged him to let me stay there for a few days until I could go to another place" (527). She stayed for four days until she was arrested, without being charged rent (526).

Two witnesses were called over defense objection (355), and testified only on the issue of knowledge and intent, as neither one was named in the indictment in connection with ay count.*

Francisco Flores testified that sometime in 1969, after his tourist visa expired, he lived at petitioner's house for one month (336-57). Petitioner helped him get a job at a factory by filling out the application, as he could not speak English (358-59, 369). Petitioner also drove him to and from work for $4 per week (359). In 1972, he moved back to petitioner's house and was there when Immigration arrested his brother (360-61). He asked petitioner to bail his brother out, since he could not do it, being illegally in the country (362). He continued to pay rent to petitioner after this occurred.

Pedro Montoya remained in the United States after his visa expired (532). He paid rent to petitioner for about

* The court instructed the jury prior to this testimony that it was of a "limited nature" . . . "you will only be able to use his testimony to — in connection with any proof of knowledge or intent or common scheme or plan . . ." (355). See also 531.

a year (533). He worked under the name of Ernesto Santos "because I had not received my social yet. So when I filled out the application [the petitioner] wrote Ernesto Santos" (536).

Over objection, immigration officers testified they executed 6 search warrants on houses owned by petitioner on July 23, 1974, finding 27 illegal aliens on the various premises. This evidence was "allowed for the limited purpose of knowledge and intent" (529).

The Government rested and the defense moved to dismiss upon various grounds: first, that by a fair reading of Section 1324, harboring is connected only with smuggling and there was no proof that petitioner had anything to do with the various illegal entries (730-31); second, that harboring is normally and generally construed to mean a secretive or clandestine hiding of the body of the alien, and there was a total failure of proof in this respect (732-33); third, that if harboring is construed in any other way, the statute is vague and does not appraise anyone of the conduct it forbids (734); fourth, that a landlord is under no duty to inquire as to the status of any individual, and in only three of the twenty counts did the Government introduce any proof of petitioner's knowledge of the aliens' illegal status (738); and finally, on the ground that "this statute when taken as a whole creates a preferred class without valid distinction, in that it exempts employers as opposed to anyone else without a rational distinction", especially since an employer giving bed and board to an employee would be exempt from criminal liability (750). The motions were denied in all respects.

The petitioner then pleaded guilty to an information charging him with one count of conspiring wilfully and knowingly to harbor Isabel Martinez-Ramon and Saul Flores Reyes, and a false statement count involving Gladys

Lopes. The plea specifically reserved the petitioner's right "to appeal from [the trial court's] rulings on his motions" (3a).

The court of appeals affirmed the conviction, holding that the term "harbor" as used in Section 1324(a)(3) "was intended to encompass conduct tending substantially to facilitate an alien's remaining in the United States illegally, provided, of course, the person charged has knowledge of the alien's unlawful status" (8a).* No proof of clandestine activity designed to shield an alien from discovery by immigration officials was deemed necessary to sustain the conviction. The court further held that "the term 'harbor' might reasonably be construed to encompass providing of shelter to illegal aliens, unconnected with the smuggling of them into the United States" (7a-8a).**

The court finally held that as construed, the statute gave reasonable notice of the activity it encompassed and that the Due Process-Equal Protection argument "is meritless" (9a-10a).

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* In enumerating petitioner's activities which it deemed to constitute harboring, the court of appeals included the arrangement of marriages for Lopes and Joya, even though this evidence was admitted only to establish that petitioner knew of illegal status of these aliens during the time they rented rooms from him (8a; and *supra*, at pp. 5-6).

** The court also held that proof of sheltering large numbers of illegal aliens established "a sufficient link with the aliens' illegal entry" to satisfy even a strict reading of the statute, despite the fact that each alien testified petitioner had no connecion whatsoever with his or her illegal entry into the Country (8a-9a).

Reasons for Granting the Writ

I.

The overbroad construction of the phrase 'conceals, harbors, or shields from detection' adopted by the court below is in substantial and irreconciliable conflict with the narrow construction of those words as they have been interpreted since this Court's decision in *Jones* v. *Van Zandt*, 5 How. 215 (1847).

The court below has construed the 'harboring and concealing' clause of Section 1324(a)(3) to include any act found "to facilitate the continued unlawful presence of aliens in the United States" (8a). Under the court's construction of the statute, clandestine activity aimed at secreting the body of the alien to prevent his discovery by federal authorities need not be proved in order to render a defendant guilty of th crime of harboring, and subject to the 5-year prison term for each alien so harbored. By broadening the definition of the crime to encompass any activity enabling an illegal alien to remain in the United States, the court below has gone beyond the plain words of the statute, the prior and consistent narrow interpretation of those words by the federal courts, and the intent of Congress in adding the clause in 1917 "merely to complete the definition of the crime of smuggling of aliens into the United States and related offenses . . ." (Senate Rep. No. 352, 64 Cong. 1st Sess. 9) and in amending the statute in 1951 in order to make the penalty provision applicable to the crime.

Consistent with the well-established rule of statutory construction favoring lenity in the interpretation of a criminal statute, and of deducing the meaning of a word in a series from its accompanying words,* the federal courts

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* See *Cleveland* v. *United States*, 329 U.S. 14 at 18 (1946), as well as the definition of the principles of *ejusdem generis* and *noscitur a sociis* at pp. 608 and 1209. Black's *Law Dictionary* (4th ed. 1951).

have never before equated the interdiction against 'concealing, harboring or shielding from detection' with other forms of assistance not involving concealment of the body of an individual from detection. Some act of concealment has invariably been held necessary to render one guilty of the crime of harboring.

Thus in *Jones* v. *Van Zandt*, *supra*, 5 How. at 227, 12 L. Ed. 122, 128, the Court construed the term 'harbor' in a civil penalty action brought under a 1973 statute 1 Stat. 302) for concealing or harboring a fugitive slave, to mean:

> ". . . to receive clandestinely, and without lawful authority, a person for the purpose of concealing him, so that another, having the right to the lawful custody of such person, shall be deprived of the same."

This definition has been uniformly utilized since that time in virtually every federal case involving the crimes of harboring under this or other harboring statutes.* See, *Sunsjar* v. *United States*, 27 F.2d 223, 224 (6th Cir. 1928):

> "When taken in connection with the purposes of the act, we conceive the natural meaning of the word 'harbor' to be to clandestinely shelter, succor, and protect improperly admitted aliens, and the word 'conceal' should be taken in the simple sense of shielding from observation and preventing discovery of such alien persons. There seems to be nothing unnatural or strained in this interpretation of the meaning of these words, when thought of in connection with the object and purposes of the act."

* Other statutes making criminal the act of harboring are 18 U.S.C. § 1071 (fugitives from justice); 18 U.S.C. § 1381 (armed forces deserters); 18 U.S.C. § 757 (enemy aliens); 18 U.S.C. § 792 (espionage violators). See also, 18 U.S.C. § 3 (accessory after the fact).

See *United States* v. *Shapiro*, 113 F.2d 891, 893 (2d Cir. 1940) (". . . some physical act tending to the secretion of the body of the offender"); *United States* v. *Smith*, 112 F.2d 83 (2d Cir. 1940) (". . . sheltered from the immigration authorities and shielded from observation to prevent their discovery as aliens"); *United States* v. *Foy*, 416 F.2d 940, 944 (7th Cir. 1969) ("'. . . to hide, secrete or keep out of sight' or 'to lodge, to care for after secreting the offender'."). In accord: *United States* v. *Mack*, 112 F.2d 290, 291 (2d Cir. 1940); *Firpo* v. *United States*, 261 Fed. 850, 853 (2d Cir. 1919); *United States* v. *Thornton*, 178 F.Supp. 42 (E.D.N.Y. 1959); *United States* v. *Biami*, 243 F.Supp. 917 (E. D. Wisc. 1965); 2 Gordon and Rosenfield, *Immigration Law and Practice*, § 9.23c, p. 9-55 (1974).*

Several of these cases have specifically refused to extend the term 'harbor' to include all forms of assistance to a fugitive or alien because of the statutory collocation of the words 'conceal' and 'harbor'. *United States* v. *Shapiro*, *supra*; *United States* v. *Foy*, *supra*; *Firpo* v. *United States*, *supra*. Additionally, it has been held that ". . . . the acts forbidden are to 'harbor' or 'conceal'. These are active verbs, which have the fugitive as their object." *United States* v. *Shapiro*, *supra*, 113 F.2d at 892. Thus the concealment be of the alien, not his illegal status. Moreover, while any degree of assistance to the alien's illegal entry

* Only one reported case has deviated from this construction, and it was reversed on other grounds "without consideration" of the grounds relied on by the lower court, *United States* v. *Grant*, 55 Fed. 414 (Ore., 1893) rev'd 58 Fed. 694, 695 (9th Cir., 1893). *Herrera* v. *United States*, 208 F.2d 215 (9th Cir. 1953), cert. den. 347 U.S. 927 (1954), relied on by the Government below, was a conviction for transportation of aliens within the United States, not a harboring case. Its citation of a dictionary definition of the verb 'to harbor' was merely to demonstrate that the word was distinct from the verb 'to transport'; not to provide a definition of the crime. 208 F.2d at 218, n. 4.

is made criminal in subsection (4) of Section 1324(a),* Congress used more limited language when specifying the activity forbidden by subsection (3). This same difference in language in the statutes dealing with assisting an escape and harboring a fugitive from justice led the court of appeals in *Shapiro, supra*, to conclude that ". . . differences in degree of the assistance rendered cannot be brushed aside." 113 F.2d at 893.

In *United States* v. *Evans*, 333 U.S. 483 at 488-490 (1948) the Court recognized the difficult questions involved in interpreting the "conceal or harbor" clause of the predecessor statute to Section 1324(a)(3). The Court specifically declined to decide whether the statute reached acts of concealing or harboring disconnected from the smuggling process (See Point II, *infra*) or what the act of harboring encompassed or whether the acts of harboring or concealing were distinct from one another. 333 U.S. at 485 n. 1 and 489-90. It merely held that the penalty provision of the statute did not authorize a penalty for concealing or harboring—however that crime was to be defined—but only for landing or bringing in an illegal alien.

When Congress amended the statute in 1952, it did so merely to overcome the lack of penalty for harboring or concealing. Significantly, it also added the words "shields from detection" to the statute, making the clause at issue read, "conceals, harbors, or shields from detection", in place of the "conceals or harbors" language used in the 1917 version. The addition of these words to the statute would tend to demonstrate, under the principles

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* Which reads:

"(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—"

of *ejusdem generis and noscitur a sociis* (*supra*, p. 13) that, rather than broadening the statute to include acts not involving concealment, Congress was making more explicit an intent to restrict the criminal acts therein enumerated only to those involving shielding of the person of the alien from discovery by immigration authorities.

Not only does the addition of the "shields from detection" language evidence a congressional intent to confine the harboring segment of the statute only to acts involving concealment, but the legislative history also indicates this intent.

Rather than treating the word "harbor" separably from the other words in the phrase, House Rep. No. 1365, accompanying the amendment, not only refers to the crime for which the penalty was added in the conjunctive—as that of "concealing *and* harboring"—but also refers to the *Evans* case as "holding that the statute did not provide an enforceable penalty for the act of *concealing* . . ." 2 *U.S. Code Cong. & Admin. News* 1653 at 1724 (1954) (Emphasis added).

The Congressional debates surrounding the adoption of the 1952 amendment to Section 1324, are both scanty and confusing. See 98 Cong. Record Senate, May 16, 1952, pp. 5319-5321, and also the debate of a similar amendment to the so-called "wet back" legislation (former Sections 1461-1468 of 7 U.S.C.), 97 Cong. Record Senate, April 27, 1951, pp. 4484-96; April 30, 1951, pp. 4512-15, May 7, 1951, pp. 4959-4977, which was subsequently rejected.

While the example of the good samaritan who lodges an illegal alien out of a spirit of Christian charity (used by the court below to sustain its broad construction of the statute (7a)) was used as a *reductio ad absurdum* in order to obtain insertion of the words "willfully or knowingly" into the body of the statute, it is far from clear that either

senator using the example "assumed that one providing lodging with knowledge of the alien's illegal presence would violate the act", as the court below states (7a).

Thus the court of appeals conclusion—that while Congress failed to define the term "harbor" in 1952, the language and background of the statutory revision demonstrate that it was expanded to encompass any conduct facilitating an alien's illegal presence in the United States, without proof of activity designed to conceal the alien from proper authorities—is simply not supported by the meager legislative history of the 1952 amendment.

What the court below has done is to expand the scope of a criminal statute beyond its historical and traditional ambit in reliance upon an ambiguous legislative intent and in disregard of the long established doctrine of strictly construing a penal statute—especially one such as this imposing severe penalties for each infraction. See generally, 3 Sutherland, *Statutory Construction*, §§ 59.03-59.05 (4 Ed. 1974).

Certiorari should be granted in this case because the decision below represents a radical departure from prior case law and statutory construction, and since the questions of statutory construction it determines were recognized by this Court in the *Evans* case as substantial, and were left open. Moreover, the record below makes it clear that this case is not an isolated prosecution. The immigration officials who testified at the trial were aware of at least four similar cases where prosecution for conduct like appellant's was being undertaken (715). Thus the issue involved is of continuing importance, and litigation is bound to continue until the question is settled by the Court.

II.

By construing the "conceals, harbors or shelters from detection" clause of the statute to apply to acts totally unconnected with the smuggling process, the court below has expanded section 1324 (a)(3) beyond its plain language and intended scope.

In *Evans* v. *United States, supra,* 333 U.S. at 488, the Court recognized that

> "There is some evidence in the legislative history that the adding of concealing or harboring was meant to be limited to those acts only when closely connected with bringing in or landing, so as to make a chain of offenses consisting of successive stages in the smuggling process."

However, the Court also recognized that the evidence of legislative intent was not conclusive, and that the "section's wording is susceptible of much broader constructions" if one gave independent effect to the words "or not lawfully entitled . . . to reside within the United States." 333 U.S. at 488.

The Court felt it unnecessary to resolve the question since Congress, in 1917, had failed to amend the penalty provisions of the statute to proscribe a penalty for concealing or harboring.

In the 1952 amendment to the statute, when the gist of the crime was altered to read "conceals, harbors or shields from detection", the penalty provision was changed from providing a five year term for "each and every alien so landed or brought in . . ." to providing such a prison term

"for each alien in respect to whom any violation of this section occurs . . ." It was also provided that employment and the usual and incidental practices incident thereto were not deemed to constitute harboring.*

The Congressional debate on the 1952 amendment sheds no light on whether Congress intended that the harboring clause of the statute reach acts not connected with the successive stages of the smuggling process, but which merely abet an illegal alien to remain within the country. See 98 Cong. Rec. *supra*. However two other factors, overlooked by the court below, make it clear that acts not connected to the smuggling of illegal aliens into the country were not being brought within the ambit of the statute by the limited 1952 amendment. First, the predecessor statute to 8 U.S.C. § 1328 had been so worded and had been declared unconstitutional; and second, after contemporeanous debate on the "wet-back" legislation (former 7 U.S.C. §§ 1461-1468), Congress determined not to punish the employment of illegal aliens—the seminal conduct aiding the illegal immigrant to remain in the United States.

* The court below uses this exemption to sustain its expanded reading of the statute, reasoning that since "such employment would not normally be related to the smuggling process", therefore any activity not related to the smuggling process was now covered by the statute. However, when the legislative history of former 7 U.S.C. §§ 1461-1468 is reviewed, it is clear that the employment exemption in § 1324 was added merely to insure that this statute would not be used to resurrect the defeated employment amendment to that legislation. If anything, the inclusion of this exemption in § 1324 indicates that Congress had no intent whatsoever to convert the smuggling statute into one which reached conduct unrelated to the smuggling process .

In *Keller* v. *United States*, 213 U.S. 138 (1909), the Court held that Congress had no power to punish conduct unrelated to the illegal importation of aliens into the country. In that case, a conviction was obtained against one who provided lodging to an alien in a house of ill-repute so that she could "follow her degraded life." 213 U.S. at 144. The Court held that "the power of Congress to punish those who assist in the importation of a prostitute is entirely immaterial," as the defendant had nothing to do with the woman's entry into the United States. 213 U.S. at 147-148. Moreover, it could not be said that providing the house of ill-repute and enabling the alien to ply her immoral trade induced her entry into the country, since

> "Every possible dealing of any citizen with the alien may have more or less induced her coming. But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If that be possible, this door is open to the assumption by the national Government of an almost unlimited body of legislation." 213 U.S. at 148.

Thereafter Congress amended the act to make criminal the harboring of an alien illegally imported into the United States for the purposes of prostitution, where the harboring was "in pursuance of such illegal importation." The addition of this modifying clause rendered the statute constitutional. See *Ex parte Szumark*, 278 Fed. 803, 807-808 (E.D. Mich. 1922).

The holding below that petitioner's providing services for aliens—although they entered the country without knowing him and without his assistance—"could reasonably have been found from all of the circumstances to have been designed to facilitate the aliens' illegal entry" (10a) is directly contrary to the Court's decision in *Keller, supra*.

Additionally the debate on the "wet back" legislation also provides evidence that Congress intended to deal with the problem of illegal immigration into the United States not by punishing persons who provide the means for an alien to remain in the country after an illegal entry was completed, but by more stringent enforcement of the existing laws against unlawful entry.

The "wet-back" legislation had been criticized because "nothing in the bill would prevent [a] person from employing the so-called wet-back or illegal immigrant," though it was believed that the most expiditous way to deal with the problem of illegal immigration was "to make it a punishable offense for an American employer knowingly to employ an alien illegally in the country." 97 Cong. Rec. *supra* at 4485, also at 4496.*

Legislation (not confined to the so-called wet-back) was introduced to require an employer to ascertain the immigration status of every employee, and to punish employers who knowingly hired illegal aliens or failed to make reasonable inquiry. 97 Cong. Rec. *supra* at 4960-4963. But the view that existing sanctions against illegal entry were sufficient to deal with the problem (see 97 Cong. Rec. *supra* at 4512-4513) prevailed, and the amendment to punish the employer of illegal immigrants was not enacted.

It is incredible that—after rejecting legislation proposed to halt illegal immigration by penalizing the employer of illegal aliens and thus removing the incentive for the alien to remain in the United States—Congress would then attempt to achieve this same result by punishing all persons—

* "Some thinks that if the immigration laws could be fixed up logically to make it an offense to employ wet-backs, who are technically fugitives from justice, it would eliminates their chances of getting jobs, and along with that the incentive for sneaking into the country." *Ibid.* at 4496.

except employers—who werely provide, not the main incentive to entry, but lodging or other incidental services to aliens who succeed in entering the country illegally in order to work. And it is more incredible that such a radical, new approach to the problem would be undertaken simply by adding a penalty provision to the 'harbors or conceals' clause of the existing smuggling statute. Or that it would be undertaken without a single senator ever suggesting that penal sanctions prohibiting persons other than employers from providing services to illegal aliens should be enacted to curtail illegal immigration; and in the absence of such a recommendation by the President's Commission on Migratory Labor, which had studied the problem and had recommended the sanctions against illegal employement. See 97 Cong. Rec. *supra* at 4977.

All this leads to the conclusion that the court below has improperly interpreted Section 1324(a)(3) by unduly broadening it to encompass activity not within the scope of the statute, and never intended to be reached by the 1952 amendment. Moreover, if this expanded interpretation is sustained, serious doubts as to the constitutionality of the statute arise. *Keller* v. *United States, supra,* and *infra,* III.

Certiorari should be granted to decide whether the statute was intended and can, constitutionally, be construed to punish conduct not directly connected to the smuggling process and which does not directly assist the illegal importation of aliens into the United States.

III.

The broad and novel construction of the statute draws its constitutionality into serious question. As construed by the court below, the statute not only fails to give fair warning that the conduct for which petitioner stands convicted constituted a crime, but it also creates an invidious discrimination, in violation of the Fifth Amendment.

The court below overruled objections to the constitutionality of the statute, as interpreted, on due process-notice grounds. It held that since the primary Webster's dictionary definition of the word "harbor" is "to give shelter or refuge to" and since the Court "had noted in *Evans* that the term harbor *might* reasonably be construed to encompass" the acts at issue in this case, the statute gave fair notice that such conduct "might be held to violate § 1324 . . ." (9a-10a, emphasis added).

The fallacies in this holding are first, that the Webster's definition has never been used by any judicial or administrative authority construing the term "harbor" in the context of this or any other penal statute; and second, that the Court in *Evans* specifically stated it was not deciding "whether 'conceals or harbors' . . . specifies only one offense or two distinct ones, or if the latter, the difference between the two." 333 U.S. at 486 n. 1. Moreover, though the Court in *Evans* speculates that the statute might be construed to encompass various acts distinct from the smuggling process, it is careful to state:

> "We do not mention these possibilities to intimate opinion concerning the reach of the statute with reference to covering them, for no such question is squarely before us." (333 U.S. at 489)

Additionally, the court below completely disregarded the narrow and precise definition accorded the "conceal or harbor" clause by the courts and the Immigration Service itself prior to its decision in this case.

In 1917, when the "conceals or harbors" clause was added to the statute, the term "harbor" had a narrow and well-defined meaning, importing clandestine sheltering of persons in order to prevent their discovery. *Sunsjar* v. *United States, supra.* Court decisions before and after the enactment of § 1324 limited the harboring crime to such conduct. Moreover, the contemporaneous administration interpretation of the statute, reflected in the Gordon and Rosenfield treatise, *supra* (written by the former General Counsel to the Immigration and Naturalization Service), also defines harboring as "clandestine or surreptitious concealment". The court below totally disregarded the fact that this interpretation is entitled to great weight.* *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969).

The fact that prior judicial interpretation and administrative enforcement of the crime of harboring had limited it to conduct involving concealment of the person of the alien, clearly demonstrates that the court below has "unforeseeably and retroactively" expanded the statute, so that it did not afford fair notice that the conduct engaged in by petitioner—which did not involve this element—was illegal.

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* From the testimony of the Government's own witnesses, it is obvious that the Immigration Service had never before used § 1324 to prosecute conduct like petitioner's. Nor had the Service ever arrested petitioner before for his activities, although it had known for years that he housed illegal immigrants (703). The witnesses testified that this was the first such harboring case brought in the New York area, though hundred of thousand illegal aliens were known to reside in the city (714). While countless arrests had been made in houses and apartments, no landlord or property owner had ever been arrested, and one agent testified he never ever heard of this happening (601-603, 654-655, 691).

Bouie v. *City of Columbia*, 378 U.S. 347, 352 (1964). As *Bouie* held:

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from unforeseeable judicial expansion of narrow and precise statutory language." (*Ibid.*)

By construing the statute to encompass conduct heretofore excluded from its ambit because no concealment was involved, the court below has rendered the statute unconstitutional under the *Bouie* decision.

Additionally, if the court below has properly construed the statute and it does make criminal not only those acts connected with the smuggling process or involving concealment, but any acts facilitating the continued unlawful presence of an alien in the United States, except employment, then the statute creates an invidious discrimination. Thus interpreted, it exempts from punishment the very conduct which most directly contributes to and facilitates the continued illegal presence of aliens in this country.

In 1951, when the flood of illegal aliens had reached crisis proportions, the Report of the President's Commission on Migratory Labor in America concluded that it was essential to make the employment of illegal aliens unlawful in order to curtail the immigration of illegal aliens into the United States. ". . . [F]or if the risk involved in employing wetbacks were increased, the traffic would soon diminsh." 97 Cong. Rec. *supra* at 4962. The commission recommended "that legislation be enacted making it unlawfull to employ aliens illegally in the United States . . .", with sanctions including fine and imprisonment and prohibition of shipment in interstate commerce of products of illegal alien labor. 97 Cong. Rec. *supra* at 4977. It was recognized that as long as illegal aliens could find employ-

ment after arrival, that they would continue to enter the United States in order to work, despite laws prohibiting illegal entry. 97 Cong. Rec. *supra* at 4512. Not only was legislation of this sort rejected, but the employment exemption to the harboring clause of § 1324 was enacted, making it abundantly clear that Congress had no intent to halt illegal immigration by punishing the employer of illegal alien labor.

Despite the belief of the court below that the Equal Protection Clause probably does not apply to a federal statute (10a), it is clear that "if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it would also be unconstitutional within the due process requirement of the Fifth Amendment." *Johnson* v. *Robinson*, 415 U.S. 361, 364-363 n. 4 (1974). If, to halt the flow of illegal aliens, this statute does make criminal acts which only incidentally encourage and facilitate their illegal immigration, while specifically exempting from its scope the acts which are the root and cause of the problem, then it has created a criminal classification which is arbitrary and unreasonable, and which does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Johnson* v. *Robinson*, *supra*, 415 U.S. at 374 ;*Cf. Herrera* v. *United States*, *supra*.

Certiorari should be granted in this case because if the construction given to "conceals, harbors or shields from detection" clause of § 1324 is correct, then the statute is unconstitutional.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

GRETCHEN WHITE OBERMAN
Counsel for Petitioner

Dated: New York City, N. Y.
August 25, 1975

Appendix A—Opinion of the Court of Appeals

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 861, 953—September Term, 1974.

(Argued April 28, 1975 Decided June 26, 1975.)

Docket Nos. 75-1023, 75-1024

UNITED STATES OF AMERICA,

Appellee,

—against—

ERNESTO LOPEZ,

Defendant-Appellant.

Before:

MOORE and MANSFIELD, *Circuit Judges,*
and HOLDEN, *District Judge.**

Appeal, with the court's permission, from a judgment of the United States District Court for the Eastern District of New York, Thomas C. Platt, *Judge,* convicting appellant, upon his plea of guilty, of conspiracy to harbor illegal aliens in violation of Title 8 U.S.C. § 1324(a)(3) and Title 18 U.S.C. § 371. The constitutionality of § 1324(a) and the applicability of its prohibition against harboring of illegal aliens to the facts of this case are upheld.

Affirmed.

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* Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

PETER M. J. REILLY, JR., Esq., Islip, N.Y., *for Defendant-Appellant.*

PAUL F. CORCORAN, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, Paul B. Bergman, Assistant United States Attorney, Brooklyn, N.Y., of counsel), *for Appellee.*

JACK WASSERMAN, Esq., Washington D.C. (Esther M. Kaufman, Attorney, Washington, D.C., Donald L. Unger, Esq., San Francisco, Calif., *Amicus* Committee), *for Amicus Curiae Association of Immigration and Nationality Lawyers.*

MANSFIELD, *Circuit Judge*:

For eight days Ernesto Lopez was tried in the Eastern District of New York before Judge Thomas C. Platt and a jury upon an indictment charging him in 20 counts with harboring aliens illegally present in the United States, in violation of Title 8 U.S.C. § 1324(a)(3).[1] After the government rested its case the court denied Lopez's motions to dismiss the indictment on the grounds that his conduct as established by the government's proof did not constitute harboring within the meaning of § 1324(a)(3) and that the statute was unconstitutional. Thereupon Lopez pleaded guilty to a superseding information charging him with conspiracy to harbor illegal aliens in violation of § 1324(a)(3). In pleading guilty to the information Lopez reserved the right, with the court's permission, to appeal from its rulings on his motions.[2] We affirm.

[1] Section 1324(a) provides:

"Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who——

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or more, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of——

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs; *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

[2] The indictment also contained three counts charging Lopez with the making of false statements to a governmental agency in violation of Title 18 U.S.C. §§ 1001 and 1546. Subsequently on September 19, 1974, two additional indictments were filed charging conspiracy to obstruct justice.

Upon his plea of guilty to the charge of conspiracy Lopez was sentenced to a term of four years and to payment of a $10,000 fine, execution of which was stayed pending appeal.

The proof introduced by the government at trial, which was not refuted by Lopez, revealed that he owned several single family houses in the Levittown-Westbury area of

Nassau County, which appellant had operated as havens for aliens who had illegally entered the United States. Appellant admitted knowledge of the alienage of these individuals. Each alien paid him $15 per week for use of one of these refuges as living quarters. Before their illegal border crossings several of the aliens had been furnished with addresses of houses owned by Lopez and, upon making their illegal entry into the United States, had proceeded directly to appellant's houses, where they were received and lodged. Upon a search pursuant to a warrant of six of these houses on July 23, 1974, investigators of the Immigration and Naturalization Service (INS) found 27 illegal aliens residing on the premises.

In addition to providing lodging to large numbers of aliens with knowledge of their illegal entry, appellant had assisted many of them in other ways designed to facilitate their continued unlawful presence in the United States. He had helped some to obtain employment by personally filling out job applications on their behalf and by transporting them in vans to and from work. In return for payment to him of substantial sums of money by others Lopez, as a means of enabling them to assume the guise of an apparently lawful status in the United States, had arranged sham marriages, i.e., ceremonies for marriages that were not consummated, with the participants parting immediately after the ceremony.

Discussion

The principal issue raised by this appeal is the construction of the word "harbor" as it is used in § 1324(a)(3), which provides that any person who "wilfully or knowingly conceals, harbors, or shields from detection or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation . . . any alien including an alien crewman not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter . . . shall be guilty of a felony. . . ."

Lopez contends that merely providing shelter to an alien with knowledge of his illegal presence in the United States is insufficient to constitute harboring within the meaning of § 1324(a)(3); in addition, he argues, the government must prove that the conduct is part of the process of smuggling of the aliens into the United States or directly connected with the alien's illegal entry. Such a nexus would presumably be established by showing that the shelter was provided clandestinely or for the purpose of concealing the alien from immigration authorities.

In support of his interpretation of § 1324 Lopez points to its legislative history. As originally enacted by Congress in 1907 that statute prohibited simply the smuggling or unlawful bringing of aliens into the United States. In 1917 it was amended by Congress to add as a crime the concealment or harboring of illegal aliens. See 39 Stat. 880. However, the penalty provisions applied only in terms of the crime of landing or bringing unauthorized aliens into the country, with no punishment attaching to the crime of concealing or harboring them. In *United States* v. *Evans,* 333 U.S. (1948), the Supreme Court declined to remedy this defect by judicial construction, holding that congressional revision of the statute was required to punish the separate crime of concealing and harboring illegal aliens. The Court based its decision in part on the ground that the penalties to be imposed might vary according to the construction of the terms "concealing" and "harboring," which could be broadly interpreted to encompass more than the "chain of offenses consisting of successive stages of the smuggling process" and to

include "offenses distinct and disconnected from smuggling operations," such as providing shelter to an alien lawfully admitted but unlawfully remaining within the country, 333 U.S. at 488. Speaking for a unanimous Court Justice Rutledge pointed out that even if the statute has been designed to create offenses disconnected from the smuggling process, Congress might not have intended to extend the penalty for smuggling to such unconnected offenses. Refusing "to undertake extension of the penalty provision blindfold, without knowing in advance to what acts the penalties may be implied," the Court concluded:

> "With both of the parties we agree that Congress meant to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply. The uncertainty extends not only to the inconsistent penalties said to satisfy the section, either grammatically or substantively if not grammatically. It also includes within varying ranges at least possible, and we think substantial, doubt over the section's reach to bring in very different acts which conceivably might be held to be concealing or harboring. The latter ambiguity affects the former and their sum makes a task for us which at best could be only guesswork.
>
> "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make." 333 U.S. at 495.

Faced with its own legislative oversight, Congress in 1952 sought to remedy the deficiencies noted in *Evans* by

adopting Public Law 283, Ch. 108, 82d Cong., 2d Sess. (66 Stat. 26) entitled "An act to assist in preventing aliens from entering or remaining in the United States illegally." Later the same year Public Law 283 was incorporated as § 274 in the Immigration and Nationality Act of 1952 (66 Stat. 228), which presently continues in effect as Title 8 U.S.C. § 1324. Although Congress did not define the term "harbor" as used in the newly enacted section, it did again state that the purpose of the Act was "to strengthen the law generally in preventing aliens from entering *or remaining* in the United States illegally" (emphasis added). See H. Rep. No. 1377, 82d Cong., 2d Sess. In debates with respect to the necessity of providing that the statutory prohibition would apply only to those who "wilfully and knowingly" conceal or harbor illegal aliens members of Congress appear to have assumed that one providing shelter with knowledge of the alien's illegal presence would violate the Act, and there was no suggestion that only conduct forming part of the smuggling process should be proscribed.[3]

At least two provisions in the statute as finally enacted are inconsistent with an intent to limit the prohibition to conduct connected with the smuggling of the alien into the United States. The first is a proviso in § 1324(a)(2) to the effect that in order to be guilty of knowingly transporting an illegal alien the person charged must "have reasonable grounds to believe that [the alien's] entry into the United States occurred less than three years prior thereto." Transportation at a point in time so long after

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[3] Appellant relies on *Susnjar* v. *United States*, 27 F.2d 223 (6th Cir. 1928), holding that "harbor" refers to the *clandestine* sheltering of improperly admitted aliens. This case was of course decided without benefit of the history of the 1952 legislation which created the present § 1324. Moreover, the Court in *United States* v. *Evans*, *supra*, failed to adopt the *Susnjar* reading of "harbor," but instead left the term's meaning unresolved.

the illegal entry would not normally be in furtherance of the smuggling process, which would long since have been completed. Secondly, Congress expressly provided that "for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." Since such employment would not normally be related to the smuggling process this exemption would, under Lopez's construction, be unnecessary.

Although our task would have been lightened if Congress had expressly defined the word "harbor," we are persuaded by the language and background of the revision of the statute that the term was intended to encompass conduct tending substantially to facilitate an alien's "remaining in the United States illegally," provided, of course, the person charged has knowledge of the alien's unlawful status.

Lopez's conduct as evidenced at trial clearly falls within this construction of § 1324(a)(3). The substantial number of illegal aliens sheltered by him, the entry of some from El Salvador with the addresses of his houses in hand, their travel directly to these houses after their illegal entry, his assistance to them in obtaining employment for them and transporting them to and from their jobs, his arrangement of sham marriage ceremonies to United States citizens for the purpose of enabling the aliens to claim citizenship, and his assistance in preparation of their applications for citizenship are circumstances which, taken together, warrant the inference that Lopez was engaged in providing shelter and other services in order to facilitate the continued unlawful presence of the aliens in the United States, which amounts to harboring within the meaning of the statute. Indeed such a large-scale operation would appear to establish a sufficient link with the aliens' illegal entry

even to satisfy the stricter interpretation of § 1324 advanced by Lopez. Although a criminal statute must not be construed with liberality, it also should "not be narrowed by construction so as to fail to give full effect to its plain terms as made manifest by its text and its context." *Lamar* v. *United States*, 241 U.S. 103, 112 (1916). We are satisfied that appellant's conduct is clearly encompassed within the meaning of § 1324 and that the construction urged by him would have the effect of failing to implement its language and purpose.

Appellant next argues on the authority of *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), that, even though the district court's construction of the term "harbor" as used in § 1324(a)(3) might be applied prospectively, its application to his conduct amounted to a denial of due process for the reason that without fair notice it expanded the narrow and precise meaning that had been given to that word. We disagree. In *Bouie* the defendants, who had entered a department store restaurant without notice that it was reserved for whites and had remained there after being asked to leave, were convicted of violating a state "unlawful entry statute" as the result of a wholly unexpected judicial expansion or enlargement of its term "entry" to cover the act of *remaining* on premises after receiving notice to move, which appeared to be at variance with the statute's plain language and post-dated the defendant's conduct. The Supreme Court reversed on the ground that the failure to give fair notice of the expanded interpretation was so patently unfair as to constitute a denial of due process, comparable to the enactment of an "ex post facto" law in violation of Art. I, § 10 of the Constitution. No such lack of notice or unfairness exists in the present case. Although "harbor" has been defined to have several meanings, including "to receive clandestinely and conceal,"

its primary meaning is "to give shelter or refuge to," see Webster's Third International Dictionary, 1031; Black's Law Dictionary, Revised Fourth Edition, 847. At the time of the conduct forming the basis of the charges against Lopez it was readily apparent, as the Supreme Court had noted in *Evans,* that the term "harbor" might reasonably be construed to encompass the providing of shelter to illegal aliens, unconnected with the smuggling of them into the United States. Furthermore, Lopez's conduct could reasonably have been found from all of the circumstances to have been designed to facilitate the alien's illegal entry. Lopez, therefore, had fair warning that his conduct might be held to violate § 1324, even if that statute were construed along the lines now advocated by him.

Finally appellant argues that § 1324 violates the Equal Protection and Due Process Clauses of the Constitution because it excludes employment of illegal aliens from "harboring" without granting a similar exemption to providing shelter. The contention is meritless. Assuming that the Equal Protection Clause applies to this federal statute, which is doubtful, see *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954), it is not difficult to find a rational basis for the distinction. As the trial judge noted, an employer of numerous persons may well have a lesser capacity to ascertain their alienage status than does a landlord to determine that of his tenants.

The judgment is affirmed.

No. 75-290

Supreme Court, U. S.
FILED
NOV 5 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

ERNESTO LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ERNESTO LOPEZ, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the "harboring" of illegal aliens can be accomplished only by "concealment" in connection with smuggling aliens into the country, and that any broader interpretation of "harboring" would not give fair warning of the conduct proscribed.

After eight days of trial in the United States District Court for the Eastern District of New York, petitioner pleaded guilty to one count of conspiring

to harbor illegal aliens, in violation of 8 U.S.C. 1324 (a)(3). He was sentenced to a term of four years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. 1a-10a).[1]

The facts are summarized in the opinion of the court of appeals (Pet. App. 3a-4a). Petitioner owned several houses in Nassau County, New York. He operated these houses as havens for aliens who he knew had illegally entered the United States. Each illegal alien paid petitioner $15 weekly for the privilege of shelter. Several of the aliens had been given the address of petitioner's houses prior to their illegal entry into the United States. Petitioner assisted the aliens in other ways. For example, petitioner completed job applications for some aliens and transported them to and from work. For large fees, petitioner also arranged sham marriages. In July 1974, Immigration and Naturalization Service investigators searched six of petitioner's houses, apprehending 27 illegal aliens.

1. To "harbor" has several possible meanings. Petitioner cites cases construing that term in a way that requires concealment, arguing that it must have the same meaning in Section 1324(a)(3). Petitioner's narrow definition of "harbor" would read it out of the statute, for it appears in the phrase "to conceal, harbor, or shield from detection * * *." Petitioner offers no persuasive argument in support of

[1] With the permission of the district court and the United States, petitioner was permitted to appeal the legal issues involved.

his assertion that "harbor" is redundant with "conceal" and "shield from detection." The term more logically has the meaning given it by the court of appeals: to harbor is to give refuge or shelter. Petitioner has done just that. There is no conflict among the circuits concerning the interpretation of Section 1324(a)(3) as amended in 1952; indeed, petitioner asserts (Pet. 25, n. *) that his case is unique. Accordingly, there is no reason to grant the petition.

2. In 1952 Congress amended the predecessor statute, 8 U.S.C. (1946 ed.) 144, in response to *United States* v. *Evans*, 333 U.S. 483, which had held that the penalty section of the statute reached only the crime of smuggling aliens and did not reach the crimes of harboring or concealment. The stated purpose of the amendment was to enlarge the statute's coverage to prevent illegal aliens "from entering *or remaining* in the United States illegally * * *." H.R. Rep. No. 1377, 82d Cong., 2d Sess. 1 (1952). The "harboring" prohibition is an integral part of the congressional design to prevent illegal aliens from "remaining" in the United States.

The language of the statute itself supports a distinction between the crimes of "concealing" and "harboring" illegal aliens. The phrase "conceal, harbor or shield from detection" is in the disjunctive. Congress emphasized the distinction between "harboring" and "concealing" by enacting a proviso exempting employers from the operation of the "harboring" provision but not from the "concealing" provision. Congress evidently understood "harbor" to be a term of

such sweep that, without the proviso, and without concealment, mere employment would constitute harboring. This proviso is strong evidence both that "harbor" is used in the statute in its everyday sense and that it is not synonymous with "conceal." Moreover, the 1952 amendments added a requirement of "willfullness and knowledge" to the harboring and concealment section. As the Senate debates show, this requirement was added to prevent a person from being guilty of harboring merely because he provided shelter to an illegal alien without knowing his illegal status. 98 Cong. Rec. 5319-5321 (1952). No mention of any act of concealment was made in connection with the discussion of "harboring."

3. Petitioner also contends that "harboring" is forbidden only if it is a part of the smuggling process. But the legislative history clearly shows that a purpose of the act was to prevent illegal aliens from remaining in this country. H.R. Rep. No. 1377, *supra*. The statute was amended specifically to create separate penalties for smuggling and harboring. An argument that the statute addresses only smuggling is consequently untenable.

Furthermore, petitioner's argument is inconsistent with at least two provisions in the statute. Section 1324(a)(2) prohibits the knowing transportation of illegal aliens; it requires proof that the defendant reasonably believed that the alien's entry into the United States occurred less than three years before. As the court of appeals recognized, "[t]ransportation at a point in time so long after the illegal entry

would not normally be in furtherance of the smuggling process, which would long since have been completed" (Pet. App. 7a-8a). Section 1324 also exempts employers from the crime of harboring. Since employment is not part of the chain of smuggling, this exemption would be superfluous under petitioner's construction of the statute. As the court of appeals assessed the case against petitioner (Pet. App. 8a-9a):

> [Petitioner's] conduct as evidenced at trial clearly falls within [the proper] construction of § 1324(a)(3). The substantial number of illegal aliens sheltered by him, the entry of some from El Salvador with the addresses of his houses in hand, their travel directly to these houses after their illegal entry, his assistance to them in obtaining employment for them and transporting them to and from their jobs, his arrangement of sham marriage ceremonies to United States citizens for the purpose of enabling the aliens to claim citizenship, and his assistance in preparation of their applications for citizenship are circumstances which, taken together, warrant the inference that [petitioner] was engaged in providing shelter and other services in order to facilitate the continued unlawful presence of the aliens in the United States, which amounts to harboring within the meaning of the statute. Indeed such a large-scale operation would appear to establish a sufficient link with the aliens' illegal entry even to satisfy the stricter interpretation of § 1324 advanced by [petitioner]. * * * We are satisfied that [petitioner's] conduct is clearly encompassed within the meaning of

> § 1324 and that the construction urged by him would have the effect of failing to implement its language and purpose.

4. Petitioner argues that the court of appeals' interpretation of Section 1324(a)(3) is so novel that petitioner was not given fair notice that his conduct was criminal. But the court of appeals simply took "harbor" at its usual meaning. This is hardly a novel or unpredictable construction. Moreover, in *United States* v. *Evans*, *supra*, 333 U.S. at 485, n. 1, this Court stated that concealment and harboring might be considered separate crimes under the predecessor statute. That harboring and concealment were intended to be separate crimes under the present statute is clear from its language and legislative history. Finally, as the court of appeals wrote (Pet. App. 10a):

> * * * [Petitioner's] conduct could reasonably have been found from all the circumstances to have been designed to facilitate the alien's illegal entry. [Petitioner], therefore, had fair warning that his conduct might be held to violate § 1324, even if that statute were construed along the lines now advocated by him.

5. Petitioner finally contends that the exception given to employers constitutes invidious discrimination. This statutory exception, however, is a classification supported by a rational basis. "[A]n employer of numerous persons may well have a lesser capacity to ascertain their alienage status than does a landlord to determine that of his tenants" (Pet.

App. 10a). The exception creates no invidious discrimination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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